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October 28, 2020

Idaho Public Defense Commission
816 W. Bannock Street, Suite 201
Boise, ID 83702

Delivered Electronically to Kathleen Elliott, IPDC Executive Director

Dear Commissioners:

The Idaho Association of Counties (IAC), formed in 1976, is a nonprofit, nonpartisan member service organization dedicated to the improvement of county government. It was designed and incorporated by county elected officials to provide services, research, uniformity, and coordination among member counties, in order for the county elected officials to serve their constituents better. IAC respectfully submits comments to the Public Defense Commission (PDC) on behalf of its 44 member counties and requests your thoughtful consideration of our recommendations.

IDAPA 61.01.02.030.05

The proposed rules include language which recommends the board of county commissioners hire outside legal counsel to advise on all public defender issues (IDAPA 61.01.02.030.05). The proposed rule is concerning on two fronts. First, requiring boards of county commissioners to hire outside legal counsel for all matters related to public defender oversight is in itself an unfunded state mandate. Requiring counties to hire outside legal counsel will increase overall public defense oversight costs to counties. It is unclear if there will be additional financial assistance from the PDC to cover these increased legal expenses. If state funding is not made available for the county to contract with outside legal counsel, less funds will be available for public defense activities.

Second, and more troubling, is that the county prosecuting attorney is statutorily mandated to advise the board of county commissioners on all legal matters. Specifically, Section 31-2604(3), Idaho Code, states the county prosecuting attorney is:

To give advice to the board of county commissioners, and other public officers of his county, when requested in all public matters arising in the conduct of the public business entrusted to the care of such officers.

The proposed rule encourages boards of county commissioners to operate outside statute. It is important to note that the public defender's office identifies the need for contracts and discusses those contracts with the board of county commissioners. The public defender is involved in negotiating, drafting, and reviewing the language in the contracts needed to fulfill the responsibilities of the office. If the prosecutor's office has a conflict which requires hiring outside counsel, that can already occur. The prosecutor and/or public defender can raise the issue of a conflict if one arises at which point the board of county commissioners can choose an appropriate course of action. Additionally, IAC has yet to locate any ethics opinions which state that a county prosecuting attorney should not advise in this situation. Indeed, the county prosecuting attorney shares the same interest in good and adequately funded public defense; as lacking such only serves to frustrate the interests of justice.

For these reasons, we recommend striking IDAPA 61.01.02.30.05 directing boards of county commissioners to retain outside legal counsel for public defender oversight.

IDAPA 61.01.02.040

The duties of a prosecutor differ in several respects from the duties of a public defender. Both roles are equally important but they are not identical. For example, the prosecutor is responsible for representing counties in civil matters. The prosecutor's office handles private counsel and conflict public defender cases in addition to public defender cases. Prosecutors also have a screening responsibility which public defenders do not, meaning a percentage of cases do not reach the public defender's office because they are not filed by the prosecuting attorney. Even though a case is not filed, there is often a significant amount of work and resources expended on declined cases, particularly in complex cases. Prosecutors have a duty to comply with constitutional and statutory victims' rights. These are only a few examples, but the point is there are differences.

To the proposed rule language, Sections .01 through .05 refer to "equal access" to staff, facilities, pay, resources and budget equity. It is unclear what "equal access" means. This language is broad, unclear and open to interpretations that are not intended. IAC recommends language that captures what appears to be the goal:

In order to ensure the public defender's office fulfills its duties and responsibilities, the budget, compensation and resources for the public defender's office should be reviewed on a regular basis and the county must ensure the public defender's budget is adequately funded to meet the needs of the office.

Another point of concern of the proposed resource parity language is the overall fiscal impact to counties. It is unclear the extent to which all counties are currently in compliance with the proposed resource equity rule. In the event that a county is not in compliance with the proposed rule, the county will incur additional costs, thus creating yet another underfunded

state mandate. IAC encourages the PDC to amend proposed IDAPA 61.01.02.040 to include a provision directing the PDC to provide additional funding to counties in the event overall county indigent defense expenses are increased as a result of the proposed resource parity rule. IAC recommends the following language:

County responsibility for compliance with the resource parity standard is contingent upon the appropriation of state funds as provided in Idaho Code § 19- 862A.

IDAPA 61.01.02.070

Proposed IDAPA 61.01.02.070 appears to be in conflict with Sections 19-860 and 19-861, Idaho Code, which grants the board of county commissioners authority to appoint a chief public defender and for the chief public defender to appoint defending attorneys. Proposed IDAPA 61.01.02.070 grants broad authority for the executive director of the PDC to determine annually which attorneys are included on the defending attorneys roster. In practice, this grants the executive director of the PDC jurisdiction over statutory hiring decisions of the board of county commissioners. As there is no statutory authority for the executive director of the PDC to override the hiring decisions of the board of county commissioners, IAC recommends that IDAPA 61.01.02.070 be removed from the proposed rules.

IDAPA 61.01.03.50.05.b.iii

The proposed rules would allow the PDC, if it determines that there is an immediate need to take action to correct a violation of the rules, to contract with a defending attorney to remedy a perceived violation at the county's expense. Because this appears to be an unlawful assumption of county budget authority, IAC does not believe that the PDC would have authority to take this action. IAC encourages the PDC to strike IDAPA 61.01.03.50.b.iii.

IDAPA 61.01.04.03.d

The current Standards for Defending Attorneys - Edition 2018 states:

County responsibility for compliance with the maximum caseload standard is contingent upon the appropriation of state funds as provided in Idaho Code § 19- 862A at a level necessary to implement the numeric standard.

This statement clarifies that the state is responsible for funding additional county public defender costs associated with compliance with caseload standards. The language under proposed IDAPA 61.01.04.03.d states:

If Caseload or Workload maximums are being exceeded and the county has timely requested and not received Financial Assistance to pay for resources needed to comply

with Caseload or Workload rules, the county's failure to comply with Caseload or Workload rules will not be deemed a Deficiency.

While the proposed language does not consider failure to comply with caseload standards as a deficiency, it does not necessarily relieve a county of its responsibility for compliance with caseload standards if the state fails to appropriate sufficient funds to implement caseload standards. This potentially leaves a county in the difficult position of meeting caseload standards without the guarantee of state resources. IAC recommends amending language in proposed IDAPA 61.01.04.03.d to make it clear that county responsibility for compliance with caseload standards is contingent upon appropriation of state funds at a level necessary to implement the caseload standard. IAC recommends retaining the language found in Standard for Defending Attorneys - Edition 2018 cited above.

Conclusion

IAC appreciates the opportunity to provide comments to the PDC. We value the collaborative relationship we enjoy with the PDC and its staff. We respectfully request that the PDC consider our recommendations and make amendments to the proposed rules as outlined in this comment letter.

Sincerely,

A handwritten signature in black ink, appearing to read 'S. Grigg', is positioned above the printed name.

Seth Grigg
Executive Director